Supreme Court, U.S.
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No. 97-185

In The

Supreme Court of the United States

October Term, 1997

NEW BREED LEASING CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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* Petitioner's statement required by Rule 29.6 appears at page ii of the Petition for Writ of Certiorari.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition for writ of *certiorari* demonstrated that the Ninth Circuit majority's enforcement of the Board's decision imposing a predecessor's terms and conditions of employment upon a successor/competitor violates this Court's holdings in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), and *NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972). To downplay that court's departure from these controlling precedents and the conflict in the courts of appeals, the Board responds with the uncritical argument that the Ninth Circuit's holding is simply a "temporally limited" remedial restoration of the *status quo ante*. (Opp., p. 8). Every element of the Board's argument is wrong: not only is the imposition of such terms not remedial, it is also neither a restoration of the *status quo ante* nor "temporally limited." Rather, the Board's effort to punish by imposing contractual terms that are its "best estimation" (Opp., p. 9) of what the parties would have agreed to absent New Breed's violations of the Act is an effort to aquire punitive authority that the statute and this Court have explicitly denied to the Board.[1]

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[1] The Board has recently been rebuffed by lower courts in its attempts to impose other punitive remedies on employers as well. *"Automatic" Sprinkler Corp.* v. *NLRB*, 120 F.3d 612, 618-19 (6th Cir. 1997) (relying indirectly on *H.K. Porter* in reversing Board bargaining and back pay order imposed for subcontracting work after collective bargaining agreement is terminated); *Unbelievable, Inc.* v. *NLRB*, 118 F.3d 795, 805-06 (D.C. Cir. 1997) (reversing as punitive Board award of attorney's fees to charging party participating in litigation).

1. As this Court's holdings make clear, the Board is granted the power to remedy violations of the Act under § 10(c), but it is denied the power to punish, especially to punish by imposing specific contractual terms upon employers or employees in contravention of § 8(d). *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953); *H.K. Porter*, 397 U.S. at 105-08 (citing, *inter alia*, the legislative history of the Act). Respondent seeks to skirt these settled principles by distinguishing *H.K. Porter* and *Burns* on two formalistic bases: first, that the Board imposed all of New Breed's predecessor's contractual terms of employment upon New Breed without explicitly imposing the predecessor's contract upon New Breed (Opp., p. 7), and, second, that this case involves violations of a subsection of § 8(a) of the Act different from the subsections at issue in *H.K. Porter* and *Burns*. (Opp., p. 12 n.5). Far from providing reasons to deny review, the Board's arguments illustrate why the Ninth Circuit's holding contravenes fundamental NLRA purposes and principles.

The Board suggests that the limitations on its power recited in *H.K. Porter* and *Burns* do not apply to this case because, in those cases, the Board sought to impose a contract on the employer, while here it only seeks to impose contract terms. Nothing in *H.K. Porter* or *Burns* supports the Board's formalistic argument; quite the opposite, it is long settled that courts must assess the practical effect of the Board's action, not the label that the Board attaches to it. *NLRB* v. *American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952) (it is "clear that the Board may not, *either directly or indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (emphasis added)).

Especially because the Board seeks to impose the predecessor's terms of employment for three and one-half years (April 1, 1994 to present) – the predecessor's agreement (through the PMA) with the Union would have expired after twenty-seven months – there is no practical difference between imposing the predecessor's contract terms and the predecessor's contract.[2] *H.K. Porter, Burns,* and NLRA §§ 8(d) and 10(c) foreclose the Board's argument.

The Board's failure to address the holdings of *H.K. Porter* and *Burns* directly is best understood and explained by its premise that, for remedial purposes, there is a distinction between remedies available for violations of §§ 8(a)(1), (2), and (3). (Opp., p. 12 n.5). The Board's distinction is based on its notion, nowhere supported by the statute, that discriminatory refusal to hire cases brought under § 8(a)(3) seek to remedy more egregious misconduct than that addressed by the other subsections of § 8(a). (Opp., pp. 9-10). Those statutory provisions, however, which proscribe various employer

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[2] In an earlier similar situation, the Ninth Circuit found:

> This court [in an earlier case] refused to enforce [an order imposing a predecessor's terms of employment] because enforcement would, in effect, cause the successor employer to be bound by its predecessor's collective bargaining agreement for the three and one-half years that the successor owned the company, a period longer than the contract period in the union's agreement with the predecessor. We also believe that to the extent that a back pay order requires payment at the higher rate for the entire period of ownership, it acts as a penalty.

Kallmann v. *NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981).

activities as unfair labor practices, do not address the type of remedy the Board is authorized to seek. There is no justification for the Board's proposed distinction – any violation of any subsection of § 8(a) can be remedied (as appropriate) under § 10(c) by any non-punitive remedy not violative of § 8(d), but those remedies have never included the imposition of substantive contract terms.

The fallacy of the Board's effort to calibrate its remedial powers based on the perceived seriousness of the violations at issue is made clear by *H.K. Porter* and *Burns*. In *H.K. Porter*, the employer wrongfully refused to bargain collectively over a dues "checkoff" provision. Although a union was certified in 1961, the employer prevented the making of a collective bargaining agreement for over eight years by refusing to allow union dues to be checked off. *H.K. Porter*, 397 U.S. at 100. As the court of appeals found *twice* (once on the merits and once in contempt proceedings), had the employer bargained in good faith and not violated the Act, it would have agreed to the checkoff provision. *Id.* at 107 ("The Board had found that the refusal [to agree to a proposed checkoff provision] was based on a desire to frustrate agreement and not on any legitimate reason."). Despite the employer's flagrant § 8(a)(5) violations, this Court refused to uphold the Board's imposition of the checkoff provision pending further bargaining because that imposition would be punitive. *Id.* at 106.

Similarly, this Court in *Burns* rejected the Board's imposition of a predecessor's contract on a successor despite the successor's § 8(a)(2) violations at least as destructive to employee interests as the § 8(a)(3) discriminatory refusal to hire violations found here. In *Burns*, the

employees in the unit had only recently voted to be represented by a union, whereupon that union had negotiated a contract on their behalf with Burns' predecessor. *Burns*, 406 U.S. at 274-75. Burns, however, coerced the same employees into signing authorization cards for a different union (the AFG) of *its* choice, then promptly proceeded to sign a new and different contract with that union. For example, as the administrative law judge found in *Burns*, "Foley [one of Burns's agents] repeatedly pushed an AFG authorization card in front of Ware [an employee] and told him the Union was out and that he had to sign the AFG card or not work for respondent." *William J. Burns Int'l Detective Agency, Inc.*, 182 N.L.R.B. 348, 353 (1970), *rev'd in part sub nom. NLRB* v. *Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972). Despite these flagrant § 8(a)(2) violations, this Court reversed the Board's imposition of the predecessor's terms of employment on the employer pending the outcome of bargaining. It found that the new employer could not be said (logically or legally) to have "*changed* unilaterally" any pre-existing terms when it set the initial terms and conditions of employment – it had "no previous relationship whatsoever to the bargaining unit." *Burns*, 406 U.S. at 294.[3]

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[3] See also *Nazareth Regional High Sch.* v. *NLRB*, 549 F.2d 873, 881-82 (2d Cir. 1977) (flagrant § 8(a)(1) violations do not empower Board to require forfeiture of employer's right to set initial contract terms); *Systems Management, Inc.* v. *NLRB*, 901 F.2d 297, 306-08 (3d Cir. 1990) (§ 8(a)(2), (3), and (5) violations do not empower Board to impose predecessor/competitor's contract on successor with regard to new hires because "there was no 'situation' . . . to which the [new hires] could be restored" and Board order "must be considered a punitive measure, and hence not enforceable"); see Pet. at 17-23 (collecting cases).

Here – while petitioner (as in *Burns*) does not ask this Court to overturn the underlying unfair labor practice findings – the Board's effort to expand its remedial powers to include punitive measures cannot be defended by arguing that the harms to employee choice are qualitatively worse than in *H.K. Porter* or *Burns*. The Board's case against petitioner rested on its inference that a discriminatory refusal to hire occurred when New Breed did not interview the predecessor's employees, since if it had done so (again relying on inference) the predecessor's employees would necessarily have been hired, and that (once more relying on inference) New Breed would then have agreed to the same contract that its predecessor had in force. By resort to these cumulative inferences, the Board found a duty on New Breed's part to honor the terms of the predecessors's contract unless and until it could bargain something else with the predecessor's union. New Breed's activities may have violated the NLRA, but under *H.K. Porter* and *Burns* they do not provide a reasoned basis for expanding the remedial powers conferred by § 10(c).

2. It is also clear that the Board's imposition of New Breed's predecessor's (and competitor's) terms of employment was not a restoration of the *status quo ante*. Prior to April 1, 1994, New Breed did not employ anyone at the Compton facility – its competitor, Maersk, did. Indeed, under *Burns* (ignored by the Board) and *Spruce Up* (misconstrued by the Board), New Breed would have been free to set any initial terms and conditions of employment that it chose had no unfair labor practices

occurred. *Burns*, 406 U.S. at 294-96; *Spruce Up Corp.*, 209 N.L.R.B. 194, 195 (1974), *enforced without opinion sub nom. NLRB* v. *Spruce Up. Corp.*, 529 F.2d 516 (4th Cir. 1975). If its goal actually were to restore the *status quo ante*, the Board therefore would have determined that bargaining was to begin from the terms and conditions of employment that New Breed actually established for the employees it did hire.[4] Such a remedy, coupled with its order that discriminatees be reinstated, fulfills the mandates of the Act to the limit of the Board's power.

Instead, the Board seeks to impose terms of employment that are *its* "best estimation" of the substantive results of the bargaining that would have occurred in the absence of unfair labor practices. (Opp., p. 9). *H.K. Porter* and *Burns*, however, foreclose the Board from making any such "estimates" of what contract terms should be. The Board is not empowered to regulate or determine the substantive results of bargaining; it is entitled only to govern the procedural aspects of such bargaining. *H.K. Porter*, 397 U.S. at 107-08. As this Court has repeatedly found, anything more is impermissible and punitive. See, e.g., *Seven-Up Bottling*, 344 U.S. at 346-47.

3. The Board also seeks to minimize its error by casting its imposition of terms as a "temporally limited"

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[4] The Board takes the same inexplicable position as the Ninth Circuit, that is, that the record is allegedly "devoid" of evidence that petitioner "would not have agreed to the [predecessor's] wage scale" (Opp., p. 13; *id.* at 9). On the contrary, the record is clear that New Breed set initial terms markedly different from the "[predecessor's] wage scale" (Pet., p. 6 n.2).

remedy. But § 8(d) does not merely prohibit the permanent imposition of substantive contract terms – it prohibits the imposition of *any* substantive contract terms. The Board attempted to broaden its powers in the same manner almost three decades ago (in *H.K. Porter* and *Burns*) by characterizing the imposition both as a remedy for contempt and as a remedy for unfair labor practices. In both situations, this Court refused to adopt the Board's suggested approach. The passage of time has not improved the statutory basis for the Board's approach or made it any less punitive.

The Board's further claim that the Ninth Circuit's decision does not conflict with decisions of other courts of appeals is based on the fallacious position that the imposition of substantive contract terms is "temporally limited." The only temporal limitations on the terms imposed by the Ninth Circuit are the eventual exhaustion of New Breed's right to review and the progress of the collective bargaining process. In contrast, the Sixth and (in a different case) Ninth Circuits have suggested a truly "temporally limited" approach. In *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 365 (6th Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988), and *Kallmann* v. *NLRB*, 640 F.2d 1094, 1103 (9th Cir. 1981), the respective courts of appeals suggested that the Board estimate the time in which the employer and union would have negotiated, either to agreement or to impasse, and limit the imposition of the predecessor's substantive contract terms to that hypothetical bargaining period.[5]

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[5] While the approach in *Armco* and *Kallmann* prevents the employer from being punished for exercising its due process

4. Petitioner recognizes, of course, that this Court may not wish to follow its decisions in *H.K. Porter* or *Burns* here; the Court may wish to adopt a new interpretation of the law or distinguish between unfair labor practices under different subsections of § 8(a). But that is precisely why a writ of *certiorari* should issue. It is vitally important for this Court to resolve the conflict in the courts of appeals, and to clarify either that the rules of *H.K. Porter* and *Burns* still apply or that this Court would now reach a different result in some or all types of cases.

CONCLUSION

For the foregoing reasons and those set forth in the petition for writ of *certiorari*, the Court should grant the petition for writ of *certiorari* and give the case plenary consideration.

Respectfully submitted,

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rights, it does not cure the revocation of the employer's right to set initial terms. Those cases thus still conflict with *H.K. Porter* and *Burns*.